fact of earlier discovery than perhaps expected does not mitigate at all nor has the appellant advanced any mitigating factor or plea for leniency based on any ground worthy of consideration.

The conviction is therefore affirmed and the appeal in this connection dismissed. He has abandoned his appeal against sentence but the Public Prosecutor has cross-appealed against sentence.

The appeal against conviction is dismissed but the Public Prosecutor succeeds on his appeal. I vary the sentence to one of one year's imprisonment on the first charge. The sentences on the remaining charges will remain, to run concurrently with the sentence on the first.

Appeal against conviction dismissed.

Sentence enhanced on the first charge.

Solicitors: *Edwin d'Souza & Co.*

THAMBYAH v. THAMBYAH

[O.C.J. (Abdul Aziz J.) August 23, 1965]

[K.L. — Divorce Suit No. 11 of 1965]

Husband and Wife — Divorce — Desertion — Constructive desertion — Cruelty — Onus of proof.

The petitioner applied for divorce alleging desertion and cruelty on the part of her husband.

Held: the onus of proof is on the petitioner and the court must be satisfied that the grounds have been proved beyond reasonable doubt. As the petitioner had failed so to satisfy the court in this case, the petition must be dismissed.

DIVORCE.

D. P. Xavier for the petitioner.

Abdul Aziz J. (delivering oral judgment): This is a petition for divorce based on two grounds, desertion and cruelty.

The petition stated that the parties were married in Seremban and that after the marriage the couple went back to Ceylon where they set up No. 27, Station Road, Ragama, Ceylon as their matrimonial home.

The petition charging the matrimonial offence are couched in very general terms but from what I gather from the evidence the petitioner alleges desertion and cruelty on the part of the husband. *Halsbury's* (vol. 12 pp. 242 *et seq*) says that the offence of desertion is a course of conduct and it must be proved that it has existed for a period of three years immediately preceding the presentation of the petition and for the act of desertion to exist there must be both the factum or physical separation and there must be intention to desert. All the necessary ingredients of desertion must continue throughout the desertion period. In the case of desertion the burden is on the petitioner to show that desertion without cause subsisted throughout the period. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole of the three year period, that the petitioner should be able honestly to say that he or she were willing to fulfil the duties of marriage and that desertion was against his or her will and continued throughout the period without his or her consent. The court must be satisfied on the evidence that desertion is proved and it must be proved beyond reasonable doubt. The evidence need not reach certainty but it must reach a high degree of probability.

The court also demands that when a matrimonial offence, whatever it is, is charged, if possible the evidence of the spouse making the charge should be corroborated. The necessity for corroboration is not an absolute rule of law and while corroboration is desirable and usual there is no rule which prevents a tribunal from finding the offence proved in the absence of corroboration.

It has been alleged here that this was not a case of actual desertion but was a case of constructive desertion. I think this is what *Halsbury's* says on constructive desertion (vol. 12 p. 247):—

> "In the case of constructive desertion the onus of proving that the intention to desert continues may be much lighter than in the case of mere withdrawal from cohabitation. A mere wish or intention that the other spouse should leave is insufficient by itself to constitute constructive desertion. The wish or intention must be accompanied by conduct which is of a grave and weighty character and which the court can properly regard as equivalent to expulsion of fact."

Now so much for the first point. Having seen the petitioner and having heard her evidence, all she has to offer by way of evidence to show that there was constructive desertion are several acts of the respondent, one of which is contained in paragraph 14. The petitioner alleged that during the Singhalese and Tamil riots in Ceylon in 1958 the husband turned out to be a coward. He turned away and hid under the bed while the rioters assaulted the petitioner. I do not know how it can be said an act of cowardice of this nature can be regarded as desertion. This was in 1958. Apparently even after this incident the parties continued to cohabit because after the riots the petitioner gave birth to the third child and after that certain other events also took place. How under these circumstances can this court infer that there was constructive desertion on the part of the husband, I really fail to see. What seems clear was that some time after this incident the petitioner left the husband, first by sending the children back to Malaya and then following the children and settling down in Malaya and obtaining a job here.

The second ground of the petition is cruelty. This is what *Halsbury's* (vol. 12 pp. 269 *et seq*) says on cruelty:—

"The legal conception of cruelty, which is not defined by statute, is generally described as conduct of such a character as to have caused danger to life, limb, or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger. To be a ground of divorce the treatment with cruelty must be treatment since the celebration of the marriage.

There is nothing in the authorities to justify the proposition that a decree based on cruelty is a remedy given, not for a wrong inflicted, but solely as a protection for the victim."

It goes on to say that "in determining what constitutes cruelty regard must be had to the circumstances of each particular case, keeping always in view the physical and mental conditions of the parties, and their character and social status."

Now what evidence have we got to show cruelty? It is generally alleged that on various occasions in 1959, 1960 and 1961 the respondent assaulted the petitioner but that alone does not prove cruelty, because when I examined the petitioner she admitted that she suffered no physical injuries nor danger to her health. I think that was all the evidence in support of cruelty. There is no other evidence to show in what manner the respondent has been cruel. The burden of proof is on the petitioner and this she has failed to prove beyond reasonable doubt.

The petition is dismissed.

Petition dismissed.

Solicitors: *D. P. Xavier & Thambiah.*

LUEN HENG & CO. v. OAKES

[A.C.J. (Abdul Aziz J.) August 23, 1964]

[K.L. — Civil Suit No. 521 of 1965]

Practice and Procedure — Application under R.S.C. 1957 O. 14 for summary judgment — Defendant offering to pay by instalments — Whether admission of liability — Whether triable issue raised.

The defendant was sued in his own behalf and on behalf of the Cosmopolitan Club for goods supplied to the club. The defendant denied that he ordered or received the goods, but had offered to pay the amount due by instalments in order to "avoid litigation". The plaintiff applied for leave to sign judgment under Order 14 of the Rules of the Supreme Court but this application was dismissed by the Assistant Registrar who held that on offer made by the defendant to pay by instalments in order to avoid litigation does not amount to an admission of liability. On appeal,

Held: the letter offering payment by instalments could be interpreted as an admission of liability or an independent offer to protect the reputation of the club in respect of misfeasance on the part of the staff of the club and as this raised a triable issue, the Registrar was correct in refusing leave to sign final judgment.

Case referred to:—

(1) *Jacobs* v. *Booth's Distillery Co.* (1901), 85 L.T. 262.

CIVIL SUIT.

B. C. Lee for the plaintiff.

S. Sothi for the defendant.

Abdul Aziz J. (delivering oral judgment): This relates to an appeal against the decision of the senior assistant registrar dismissing an application by the plaintiff for leave to sign judgment under Order 14 of the Rules of the Supreme Court.

In her judgment she says firstly that the defendant was also being sued on his own behalf for goods supplied to the club and secondly the defendant denied having ordered or received the goods. She went on to say that the fact that there was an offer made by the defendant to pay by instalments the amount due which offer was made in order to avoid litigation does not amount to an admission of liability. She therefore refused leave to sign judgment. Against that order the plaintiff now appeals.

It has been said that "the summary jurisdiction conferred by this Order (O. 14) must be used with care. A defendant ought not to be shut out from defending unless it is very clear indeed that there is no case in the action under discussion. Summary judgment under this rule should not be granted when any serious conflict as to the matter of fact or any real difficulty as to matter of law arises." In the case of *Jacobs* v. *Booth's Distillery Co.*[1] it is stated that "Order 14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the court or to make him liable in such a case to put on terms of paying into court as a condition of leave to defend."

The whole case rests on the interpretation of that part of the letter offering payment by instalments to "avoid litigation" sent by Mr. Oakes as treasurer of the club. That letter, to my mind, can be interpreted to mean an admission of liability or an independent offer to protect the reputation of the club in respect of misfeasance on the part of the staff of the club. This is a triable issue and is not a matter for the registrar to consider when dealing with an application.

I therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Shook Lin & Bok; Lovelace & Hastings.*